

OCT - 5 1998

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
McLEODUSA TELECOMMUNICATIONS	)	CC Docket No. 98-84
SERVICES, INC.	)	
	)	
Petition for Preemption of Nebraska Public	)	
Service Commission Decision Permitting	)	
Withdrawal of Centrex Plus Service by	)	
U S WEST Communications, Inc.	)	

**REPLY COMMENTS OF  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by undersigned counsel and pursuant to the Commission's September 3, 1998 *Public Notice*, respectfully submits its Reply Comments in the above-captioned proceeding.

The well-developed record in this proceeding makes clear that a state-sanctioned barrier to competitive entry persists in Nebraska, notwithstanding the fact that the November 1996 order of the Nebraska Public Service Commission ("PSC") has been vacated by the Nebraska Supreme Court.<sup>1</sup> Numerous commenters throughout this proceeding have supported Commission preemption in light of the Nebraska PSC's failure to consider the anticompetitive implications of U S WEST Communications, Inc.'s ("U S WEST") proposed Centrex withdrawal under federal law and the

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<sup>1</sup> See *In the Matter of McLeod Telemanagement, Inc.; MCI Telecommunications Corp.; and AT&T Communications of the Midwest, Inc. vs. US West Communications, Inc.*, Docket Nos. FC-1252, FC-1253, and FC-1254, Opinions and Findings of Fact (Neb. PSC Nov. 25, 1996) ("*Nebraska Order*").

PSC's failure to stop that rate list from taking effect.<sup>2</sup> Nothing in the Nebraska Supreme Court's decision to vacate the *Nebraska Order* alters the fundamental fact that carriers remain unable to provide competitive services in Nebraska as a result of the Nebraska PSC's allowing the U S WEST rate list to take effect unchecked. As CompTel articulately explained in its recent comments, "the legal requirement to be reviewed by the Commission pursuant to Section 253 remains the same. . . . [T]he amended rate list becomes legally binding on U S WEST and its customers and is, therefore, a legal requirement under Section 253."<sup>3</sup> McLeodUSA respectfully submits that the Commission would hardly serve the procompetitive purpose of section 253 (and potentially shelter a host of anticompetitive legal requirements) if it were to find here that a state's failure to stop *patently discriminatory conduct that violates federal law* cannot constitute a barrier to competitive entry.

Notably, U S WEST is the only party to file in support of its own *ex parte* presentation. This dearth of support for U S WEST's position is telling. In fact, U S WEST retreats somewhat in its most recent comments, claiming now that there is "no *single* Nebraska legal requirement" that could be preempted, and "no *formal* state action" to consider in this case.<sup>4</sup> While McLeodUSA disagrees with the qualifications used by U S WEST, McLeodUSA is delighted at the very least to note that U S WEST appears to acknowledge that there is some legal requirement and state action at issue in

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<sup>2</sup> See generally Comments and Replies filed by the Association for Local Telecommunications Services; MCI Telecommunications Corporation; Frontier Telemanagement, Inc. and Advanced Telecommunications, Inc.; WorldCom, Inc.; the Telecommunications Resellers Association; the Competition Policy Institute; and the Competitive Telecommunications Association ("CompTel").

<sup>3</sup> CompTel, at 7.

<sup>4</sup> U S WEST, at 3, 4 (emphasis added).

this proceeding. A state's failure to stop a discriminatory provision from obtaining the color of law should be considered as much of a legal requirement (and a state-sanctioned barrier to entry) as any statute, regulation, or order affirmatively enacted or promulgated by the state entity.<sup>5</sup> Such a failure is particularly egregious when this Commission has explicitly directed the states to "ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services."<sup>6</sup> In allowing U S WEST's withdrawal of Centrex to take effect without any examination of the competitive implications of that withdrawal under federal law, the Nebraska PSC abdicated its duty under federal law and erected a barrier to entry that continues to keep McLeodUSA and other carriers out of the Nebraska local exchange market. Section 253 dictates that such a legal requirement – whether enforced by affirmative state action or sanctioned by state permissiveness – *must* be preempted where it could have the effect of prohibiting competitive entry and where it conflicts with the procompetitive provisions of the Act.<sup>7</sup>

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<sup>5</sup> Although the Nebraska PSC is not authorized to regulate the rates of telecommunications companies under Nebraska law, it certainly retains the authority under state law to regulate the *services* offered by those companies. *See* Neb. Rev. Stat. § 86-803(1) (1994). More importantly, as discussed below, the Nebraska PSC abdicated its independent duty under *federal law* to ensure that the withdrawal was neither discriminatory nor in violation of the resale provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").

<sup>6</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC 15499, 15978 (1996).

<sup>7</sup> As CompTel highlights, section 253(d) *requires* the Commission to preempt state legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." CompTel, at 2. *See also* 47 U.S.C. § 253(a), (d) (1996).

U S WEST also misses the mark when it claims that a party could now file a complaint with the Nebraska PSC challenging the withdrawal of Centrex.<sup>8</sup> As McLeodUSA and CompTel both explained in their most recent Comments, the Nebraska statutes provide that a complaint regarding the effectiveness of proposed rates must be presented to the Nebraska PSC within 120 days of the date the proposed rates are filed.<sup>9</sup> Of course, it has been more than 120 days *since McLeodUSA's petition for preemption was filed with this Commission*, and approximately 32 months since the proposed withdrawal of Centrex was filed with the Nebraska PSC. Thus, action by this Commission offers the only chance left for any relief from the discriminatory impact of the Centrex withdrawal in Nebraska.<sup>10</sup>

Most importantly, despite U S WEST's transparent efforts in its *ex parte* presentation to distract the Commission, the question of McLeodUSA's remaining rights under *state law* is not at issue in the present case. The primary matter of concern here is whether the Nebraska PSC abdicated its duty to enforce *federal law* when it allowed U S WEST to violate sections 251(b)(1) and 251(c)(4) of the Act.<sup>11</sup> For example, in a similar case, the Commission found that a continuous property restriction in Southwestern Bell's tariff was an unreasonable restriction on Centrex Plus

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<sup>8</sup> U S WEST, at 2.

<sup>9</sup> McLeodUSA, at 4; CompTel, at 6. *See Nev. Rev. Stat. § 86-803(3) (1994).*

<sup>10</sup> U S WEST states that the Frontier/Enhanced Telemangement complaint filed pursuant to section 208 "does not provide a viable alternative to the McLeod preemption petition." U S WEST, at 2. While McLeodUSA does not necessarily agree with U S WEST's characterization of the Commission's authority pursuant to section 208, it would urge the Commission to act to address Centrex withdrawal in Nebraska on the basis of the current, well-developed record in the present proceeding.

<sup>11</sup> 47 U.S.C. §§ 251(b)(1) and (c)(4) (1996).

resale in violation of section 251(c)(4)(B) of the Act, and that enforcement of the provision by the Texas Public Utility Commission violated section 253(a) of the Act.<sup>12</sup> Likewise, here the Nebraska PSC allowed U S WEST's revised rate lists to take effect with no substantive consideration of the incumbent's anticompetitive actions in light of these essential provisions of the Act. By contrast, numerous other state commissions have recognized their duty to review and enforce the Act, and rejected U S WEST's efforts to sidestep its obligations under federal law to make Centrex Plus available for resale.<sup>13</sup> Given the Nebraska PSC's failure to enforce the resale provisions of the Act, this Commission is the only entity that can ensure that these provisions of federal law inure to the benefit of consumers and promote competitive developments in Nebraska.

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<sup>12</sup> *Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3561-3567 (1997).

<sup>13</sup> *See, e.g., McLeodUSA Telemanagement, Inc. v. U S WEST Communications, Inc.*, Docket Nos. FCU-96-1, FCU-96-3, slip op. at 8 (Iowa Utils. Bd. June 14, 1996); *In the Matter of the Application of U S WEST Communications, Inc. to Discontinue its Centrex Plus Services to New Customers*, Docket No. T96-023, Final Order (S.D.P.U.C. Aug. 22, 1996), at 3-4; *The Investigation and Suspension of Tariff Sheets Filed by U S WEST Communications, Inc., With Advice Letter No. 2578 Regarding the Discontinuance of Offering Centrex Plus to New Customers*, Docket Nos. 96S-071T, 96A-051T, Recommended Decision (Col. P.U.C. Sept. 3, 1996). Ultimately, eleven states — Oregon, Iowa, South Dakota, North Dakota, Colorado, Utah, Minnesota, Wyoming, Arizona, Washington, and New Mexico — all found U S WEST's withdrawal of Centrex anticompetitive and in violation of state law and/or the Act.

For the foregoing reasons, McLeodUSA respectfully requests that the Commission act favorably upon the Petition for preemption filed on June 2, 1998. Because the record clearly demonstrates that the state-sanctioned withdrawal of Centrex has had (and continues to have) the effect of prohibiting competitive entry in Nebraska, the Commission should act expeditiously pursuant to section 253 to preempt this discriminatory legal requirement.

Respectfully submitted,



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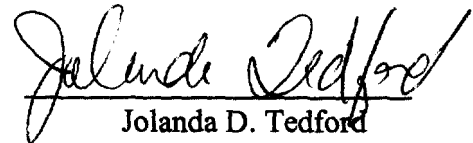
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Dated: October 5, 1998

**CERTIFICATE OF SERVICE**

I, Jolanda Tedford, hereby certify that a copy of the foregoing **Reply Comments of McLeodUSA Telecommunications Services, Inc. in Docket No. 98-84** was sent to each of the following parties by U.S. mail, postage prepaid and as otherwise specified below on this 5<sup>th</sup> day of October, 1998.

**SEE ATTACHED SERVICE LIST**

  
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